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IN THE

Supreme Court of the United States

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INTERSTATE BRANDS CORPORATION,

Petitioner,

v.

BAKERY DRIVERS & BAKERY GOODS VENDING MACHINES, LOCAL UNION NO. 550, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROY N. WATANABE
Counsel of Record
ERIC R. GREENE
SPIVAK, LIPTON, WATANABE, SPIVAK & MOSS LLP
Attorneys for Respondent
1700 Broadway
Suite 2100
New York, New York 10019
(212) 765-2100

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Respondent, Bakery Drivers Local Union No. 550 ("Respondent," "Local 550," or the "Union"), submits this brief in opposition to the Petition for a Writ of Certiorari filed by Interstate Brands Corporation ("Petitioner" or "IBC").

POINT I

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S LAWSUIT BROUGHT UNDER SECTION 303 OF THE LMRA WAS ARBITRABLE UNDER THE BROAD ARBITRATION CLAUSE CONTAINED IN THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

The underlying issue presented in this case is whether a lawsuit brought by Petitioner against the union under Section 303 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 187, is subject to arbitration under what the Court of Appeals observed to be the "unusually broad arbitration clause" contained in the parties' collective bargaining agreement. Pet. App. A, 3a. That clause subjects the following matters to grievance and arbitration:

> [A]ll complaints, disputes or grievances arising between [the parties] involving questions of interpretation or application of any clause or matter covered by this Agreement, or any act or conduct or relation between the parties hereto, directly or indirectly.

Id.

In view of the breadth of the agreement's arbitration clause, the United States District Court for the Eastern

District of New York held that the Petitioner was obligated to arbitrate its statutory claim and therefore dismissed IBC's lawsuit:

> In this case, the Court concludes that the broad arbitration clause as set forth in [the] agreement does cover Plaintiff's claim . . . . Indeed, Plaintiff's claim is a "dispute" "arising between" the Plaintiff and Local 550 involving "conduct" "between the parties."

Pet. App. B, 25a-26a.

The Second Circuit affirmed, as it agreed with the District Court that Petitioner's Section 303 claim is clearly covered under the agreement's broad arbitration clause:

> Thus, it seems appropriate for us to infer from [the arbitration clause] of the Agreement that IBC has waived its right to a judicial forum for the vindication of its federal statutory claim. . . . [The arbitration] language is unusually broad. The district court recognized that the arbitration provision is quite similar to one our court deemed "very broad" in Associated Brick Mason Contractors v. Harrington, 820 F.2d 31 (2d Cir. 1987). Indeed, the two clauses are nearly identical. Such language "could hardly be broader," and is reasonably read to reach matters beyond the application and interpretation of the Agreement.

Pet., App. A, 8a-9a. (emphasis supplied) (additional citations omitted).

The Court of Appeals stated, moreover, that such a conclusion "is compelled as a matter of contract construction, without the use of any presumption." Pet. App. A, 9a. In so holding, the Circuit Court was faithful to the Supreme Court's recent decision in Wright v. Universal Maritime Service Corp., __ U.S. __, 119 S. Ct. 391 (1998). Wright requires a court to determine whether, without the use of a presumption favoring arbitrability, an "ordinary textual analysis of a CBA show[s] that matters which go beyond the interpretation and application of contract terms are subject to arbitration." Id. at __, 119 S. Ct. at 396.

The Second Circuit also followed Wright in concluding that it was not required to find that Petitioner had "clearly and unmistakably" waived its right to a judicial forum for its Section 303 claim.[1] In Wright, the Court held that a union's negotiated waiver in a collective bargaining agreement of an individual employee's statutory right to a judicial forum may be given effect only if it is "clear and unmistakable." Id. at __, 119 S. Ct. 395-96. By contrast, the Wright Court explicitly stated that "the clear and unmistakable requirement [i]s not applicable" in the case of an individual employee who, as a direct party to a contract, has personally "waiv[ed] his own [statutory] right" to a judicial forum. Id. at __, 119 S. Ct. at 397 (emphasis supplied) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that a claim brought under

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[1] Petitioner misstates the Second Circuit's opinion when asserting that the Court "not[ed] the absence of a clear, explicit statement that IBC waived its right to proceed under Section 303 in federal court." Pet. 3. The Court of Appeals did not say that the agreement failed to contain language indicating a clear and unmistakable waiver. Rather, the Court held that the "clear and unmistakable waiver" requirement does not apply to a party that is a direct party to an agreement to arbitrate. Pet. App. A, 8A.

ADEA was subject to compulsory arbitration pursuant to arbitration provision in a securities registration form)).

Given the Wright Court's determination that the clear and unmistakable standard does not apply where the matter involves an individual employee's waiver of his or her own statutory right to a judicial forum, it follows *a fortiori* that the same analysis applies where the statutory right belongs to an employer that too is a direct party to an arbitration agreement. The Second Circuit thus correctly concluded that, under Wright, the clear and unmistakable standard is not applicable when a waiver is made by a direct party to an agreement to arbitrate, whether that party happens to be an employee or an employer:

> Wright's "clear and unmistakable" standard is based upon a concern about allowing a union to waive an individual employee's statutory rights—i.e. a concern about the waiver of one's rights by someone else. Where, however, one waives one's own rights, the "clear and unmistakable" standard is not required. We thus see no reason why an employer that, like IBC, has individually negotiated a CBA with a union should be held to have waived its statutory rights only if the waiver was "clear and unmistakable." Such an employer has negotiated on behalf of itself.

Pet. App. 8a, 9a.

Petitioner cites several pre-Gilmer cases where courts followed language found in the Second Circuit's 1980 decision in Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, 109 F.2d 948, 953

(1968), that a "clear and unmistakable" waiver statement was required before an employee's right to a judicial forum for a Section 1983 claim could be deemed valid. Pet. 13-15.[1] However, as the Second Circuit here correctly noted, "following [that] language in Old Dutch Farms would, in effect, conflict with a key aspect of the holding in Wright," that the clear and unmistakable waiver is applicable only to a union's negotiated waiver of an individual's statutory claim. Pet. App. A, 13a; see also Farmland Dairies Inc. v. NEB Drivers & Dairy Employees Union Local 680, 956 F. Supp. 1190, 1200 (D.N.J. 1997) (relying on Gilmer line of cases, court holds that the "clear and unmistakable" waiver requirement is not applicable to employee's Section 1983 claim).

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[1] Petitioner erroneously asserts that the "clear and unmistakable" standard has otherwise been applied to a waiver of an employee's statutory claim, citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983). Pet. 12. In fact, the Wright Court stated that Metropolitan Edison concerned the question whether "a union could waive its officers' statutory right under § 159(a)(3) of the [NLRA] to be free of antiunion discrimination." Wright, __ U.S. at __, 119 S. Ct. at 396. Thus, as Metropolitan Edison, like Wright, involved a union's purported waiver of an individual employee's statutory right, it has no bearing on the issue of the validity of an employee's waiver of a judicial forum pursuant to a freely negotiated arbitration agreement. The other case cited by Petitioner, Thomas Distrib. Business Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997), similarly does not advance Pet.'s position as that case involved the question of a union's waiver of its statutory right under the NLRA to bargain over the elimination of a work shift.

As an additional matter, the Wright Court's application of the "clear and unmistakable" standard to a union's negotiated waiver of an individual employee's statutory claim was motivated by broad policy concerns that do not exist in the case at bar. Thus, in carving out that narrow exception to the Gilmer line of cases, the Wright Court explicitly relied upon the Supreme Court's decisions in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981). In those cases, the Supreme Court was particularly concerned about a claim that "is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." Barrentine, 450 U.S. at 737. Clearly, no such concerns exist as to a lawsuit brought by a nationwide producer and distributor of cake and bakery products seeking damages resulting from an alleged secondary boycott. Pet. App B., 18a. [3]

POINT II

CONGRESS DID NOT INTEND TO EXCLUDE SECTION 303 CLAIMS FROM ARBITRATION

In Mitsubishi, the Supreme Court unequivocally abandoned the presumption against arbitration of statutory claims and held that a party opposing such arbitration has the burden of proving that Congress evinced an intention, through the statute's text or its legislative history, to preclude a waiver of judicial remedies for the statutory

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[3] The Supreme Court has also expressed a policy concern where a broad arbitration clause resulted "from overwhelming economic power." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627, (1985); see also Shearson American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987). Applying the clear and unmistakable standard to a national employer's statutory claim would turn such a policy on its head.

rights at issue. 473 U.S. at 628; see also Shearson/American Express, 482 U.S. at 227.

The District Court below unearthed no such Congressional intent. Instead, it determined that "there is no evidence [of] Congressional intent to preclude [Section 303] claims for arbitration." Pet. App. B, 29a, 30a; see also Farmland Dairies, Inc., 956 F. Supp. at 1202 (reviewing statute and legislative history of the LMRA, court concludes that "there is no indication that [a federal court] remedy was meant to be exclusive if the parties have agreed otherwise").

Petitioner nonetheless contends that it has met its burden of proof under Mitsubishi and Shearson/American Express demonstrating that Congress intended to exclude Section 303 claims from arbitration. Pet. 3. The crux of Petitioner's argument is that the mere fact that Congress made damage claims under Section 303 of the LMRA judicially enforceable is sufficient to establish that Congress intended to preclude arbitration of such claims. In support of its argument, IBC points to references in the legislative history of Section 303 addressing the remedial and deterrent functions of a damages claim. Pet. 4-5. This precise argument was rejected in both Mitsubishi and Shearson/American Express.

In Mitsubishi, the Court conducted an exhaustive investigation of Section 4 of the Clayton Act, 15 U.S.C. § 15, to determine whether Congress, in creating a judicially enforceable private-treble damages claim, intended to exclude such a damages claim from arbitration. The Court found no such Congressional intent:

> [n]otwithstanding its important incidental policing function, the treble-damages cause of action . . . . seeks primarily to enable an injured competitor to gain compensation for

> that injury. . . .[s]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

473 U.S. at 635, 637.

The Mitsubishi Court made clear, moreover, that the submission of a treble damages claim to arbitration would not undermine the substantive rights afforded under the statute: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628.[4]

Likewise, the Shearson/American Express Court found no evidence that Congress intended to exclude a treble damages claim brought under the RICO statute from arbitration, even though "the legislative history of [18

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[4] IBC's reliance on the pre-Mitsubishi decision rendered by the Seventh Circuit in 1964 in Twin Excavating Co. v. Local Union No. 731, 337 F.2d 437 (7th Cir. 1964) is misplaced. The Seventh Circuit's hesitation in Twin Excavating to subject an employer's Section 303 claim to arbitration reflected previously held notions that arbitrators were limited to hearing statutory claims sounding in contract, as opposed to those involving torts. However, as the Mitsubishi Court stated emphatically: "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution [of statutory claims]." 473 U.S. at 626-627, 105 S. Ct. at 3354." Indeed, Twin Excavating has not been cited since Mitsubishi by a single court in any jurisdiction.

U.S.C.] § 1964(c), reveal[ed] [an] emphasis on the remedial role of the treble-damages provision." 482 U.S. at 240.[5]

Petitioner makes the additional argument that the National Labor Relation Board's deferral policies regarding unfair labor practice charges brought under Section 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4), substantiate its claim that Congress intended to exclude LMRA Section 303 claims from arbitration. IBC, however, erroneously conflates two distinct and unrelated legal remedies.

The Supreme Court, in International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952), reviewed the LMRA's legislative history and concluded that the respective modes of relief provided under Section 8(b)(4) of the NLRA and Section 303 of the LMRA are separate and independent of each other:

> Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of

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[5] The Shearson/American Express Court also rejected the argument, identical to the one made by Petitioner here, Pet. 4, that Congress' failure to specifically identify arbitration as a substitute forum for a claim brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), meant that Congress intended to exclude such a statutory claim from arbitration. 482 U.S. at 229-238.

> each other. Certainly there is nothing in the language of § 303(a)(4)[6] which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite appears to be true.

Id. at 243-44 (footnote omitted).

Thus, Petitioner's reference to the NLRB's deferral policies in the case of 8(b)(4) charges as evidence of Congressional intent with respect to the separate and different remedy provided by Congress under Section 303 misses the mark entirely.

As a public law enforcement agency, the NLRB vindicates public rights through its pursuit of equitable relief under Section 8(b)(4). By stark contrast, Congress, in enacting Section 303, "set aside for private redress, acts which might also be subjected to the administrative process." Juneau Spruce, 342 U.S. at 244 (emphasis supplied).[7] When redress is pursued through the Board's administrative process, public – not private – rights and

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[6] Section 303(a) formerly contained separate subsections which addressed each of the respective subcategories of Section 8(b)(4). These subsections were eliminated in 1959 with the adoption of the Landrum-Griffin amendments to the LMRA in order to streamline the statute. See 105 Cong. Rec. 3512 (1959).

[7] As Petitioner acknowledges, Congress specifically divested the NLRB of jurisdiction to pursue a Section 303 damages claim. Pet. 4.

agreements are implicated.[8] When relief is sought by a private employer under §303, purely private rights are at issue.

Thus, the Supreme Court has held that when a statute provides for both public and private remedies, the disposition of the public remedy is irrelevant to the determination of the validity of a contractual agreement to arbitrate a private cause of action involving the same or similar underlying facts. See Mitsubishi, 473 U.S. at 633 (treble-damages suits under federal antitrust laws may be subject to arbitration even though such conduct may also give rise to claims of criminal liability); Shearson/American Express, 482 U.S. at 240 (the "overlap" between RICO's civil and criminal provisions does not render a treble-damages claim nonarbitrable).

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[8] The NLRB has broad discretion to decide whether or not to defer an unfair labor practice charge to arbitration. See Hammontree v. NLRB, 925 F.2d 1486, 1499 (D.C. Cir. 1991) ("Board's policy of deferment represents a reasonable construction of the Board's statutory duties and authority under the NLRA and the LMRA"). But its election not to exercise such discretion has no bearing on the enforceability of a private employer's contractual commitment to arbitrate its private damages claim.

CONCLUSION

For the foregoing reasons, IBC's Petition for a Writ of Certiorari should be denied.

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New York, New York

Respectfully submitted,

ROY N. WATANABE
Counsel of Record
ERIC R. GREENE
SPIVAK, LIPTON, WATANABE,
SPIVAK & MOSS LLP
Attorneys for Respondent
1700 Broadway
New York, New York, 10019
(212) 765-2100